NO. 85-926

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CHRISTIAN BROADCASTING NEWORK, INC.,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
MOTION PICTURE ASSOCIATION AMERICA, INC., *ET AL.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT, MOTION PICTURE ASSOCIATION OF AMERICA, INC., *ET AL.*, IN OPPOSITION TO PETITION

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January 27, 1986

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STATUTE:

Copyright Revision Act of 1976, 17 U.S.C. §101 *et seq.*:

17 U.S.C. §111 4,5
17 U.S.C. §111(c) 1
17 U.S.C. §111(d)(2)(A) and (B) 2
17 U.S.C. §111(d)(5) 2,4,5
17 U.S.C. §116 4
17 U.S.C. §116(c)(2) 4
17 U.S.C. §116(c)(4) 4,5
17 U.S.C. §801-810 2

LEGISLATIVE HISTORY:

H.R. Rep. No. 1476, 94th Cong. 2d Sess. (1976) 2

COURT RULE:

Rule 17.1, Supreme Court Rules 4

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BRIEF OF RESPONDENT, MOTION PICTURE ASSOCIATION OF AMERICA, INC., *ET AL.*, IN OPPOSITION TO PETITION

The Respondent, Motion Picture Association of America, Inc., *et al.* (Program Suppliers),[1] opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Curcuit filed by Petitioner, The Christian Broadcasting Network, Inc. (CBN).

STATEMENT OF FACTS

The Copyright Revision Act of 1976, 17 U.S.C. §101 *et seq.*, grants cable systems a compulsory license to retransmit the copyrighted works broadcast by television stations. 17 U.S.C. §111(c). In return for this privilege,

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[1] Program Suppliers were a Petitioner and Intervenor in the several cases decided by the court below. Appendix A to Petition 5a and 6a (hereinafter cited as "Pet. App._____."). National Public Radio, also a Petitioner and Intervenor below, joins in this opposition.

cable systems file statements of account and pay royalty fees based upon the amount of nonnetwork programming retransmitted by the cable system from "distant" television stations. 17 U.S.C. §§111(d)(2)(A) and (B). The royalty fees collected are distributed by the Copyright Royalty Tribunal (Tribunal). 17 U.S.C. §§111(d)(5) and 801–810. Distribution of the royalty fees is made to claimants for a wide range of works on television and radio stations retransmitted by cable systems. The first royalty distribution proceeding related to royalties collected for 1978, and proceedings have been held for each yearly fund since then.[2] *See generally*, Pet. App. 47a–51a (Description of the Tribunal's procedures and the claimants.).

Congress did not specify guidelines for distributing royalites, but gave the Tribunal discretion to distribute based upon "all pertinent data and considerations presented by the claimants." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 97 (1976). The Tribunal established three primary criteria — harm, benefit, and marketplace value — and two secondary criteria — time and quality — as beacons by which distribution would be guided. Pet. App. 53a–55a. Claimants have offered differing theories and support as to how the royalty funds should be distributed. All evidence has been evaluated in terms of the criteria, with particular emphasis on the marketplace value standard. *Id.*

Although the size of the royalty fund increases each year as the cable industry grows, the Tribunal's task remains the same: to make a relative distribution among claimants. That is, the Tribunal's allocations are expressed in percentage terms adding to one hundred percent. Pet. App. 51a. This task, coupled with the lack of express statutory standards, requires the exercise of judgment and discretion, not precise pinpointing. This, in turn, leads to

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[2] With the exception of the 1981 royalty fund as to which all claimants reached agreement.

considerable second-guessing by claimants, and to appeals from each of the distribution decisions.

For example, the instant petition involves the 1979, 1980, and 1982 distribution determinations. Petition For Writ at 1. The 1979 determination has been the subject of two separate decisions by the Tribunal and two separate decisions by the Court of Appeals. Pet. App. 7a-8a. The original 1980 decision was vacated and remanded summarily by the Court of Appeals, Pet. App. 39a-40a, and after being rewritten was the subject of a full opinion by the Court of Appeals. Pet. App. 20a *et seq.* Only the 1982 proceeding, in which all parties (but petitioner) resolved royalty distribution among themselves by settlement, Pet. App. 89a, has not been subject already to more than one trip through the appellate process. The consistent result of these several reviews has been an affirmance of the Tribunal's "inherently subjective judgment calls and rough balancing of hotly competing claims" based upon "the broad discretion necessarily conferred upon the Copyright Royalty Tribunal in making its distributions." Pet App. 37a-38a. Not content with the overlay of review already weighing on these determinations, petitioner now seeks yet further delay and confusion to these same matters.[3]

REASONS FOR DENYING THE WRIT

I. The Alleged Conflict Rests Upon Elementary Statutory And Factual Distinctions Between The Matters

Petitioner claims conflict (Petition 9-10) between courts

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[3]The proceedings involving the 1983 royalty distribution are currently in progress. The Petition for Writ has the effect of keeping the conclusions of the earlier decisions open — at least as they relate to Petitioner — and thus providing a measure of uncertainty as to their precedential value in the 1983 decision. This effect may be of more importance to Petitioner than the remote possibility that this Court would grant the petition.

of appeals' decisions interpreting two unrelated provisions of the 1976 Revision Act. One decision interprets 17 U.S.C. §116 relating to jukebox royalties, while the decision below interprets 17 U.S.C. §111 relating to cable television royalties. These sections dealing with different substantive areas have different statutory language.

A. There Is No Conflict On The Same Matter

Under Rule 17.1(a) of this Court's Rules, consideration may be given to whether decisions of courts of appeals conflict "on the same matter" in judging whether to grant a writ. To be the same, the courts must address the same statutory provision or regulation. *See e.g., Bingler* v. *Johnson*, 394 U.S. 741, 747 (1969) (Same matter related to one subsection of regulations.). Petitioner would, however, have this Court consider a purported conflict where separate sections of the 1976 Revision Act were addressed.

The case below dealt with 17 U.S.C. §111, and the purported case in conflict, *Acemla* v. *Copyright Royalty Tribunal*, 763 F.2d 101 (2nd Cir. 1985), dealt with 17 U.S.C. §116. These two sections differ substantially in their statutory requirements for distribution. *Compare* 17 U.S.C. §111(d)(5)(A) *with* 17 U.S.C. §116(c)(2). Section 116 contains a provision, 17 U.S.C. §116(c)(4), which divides claimants into specific categories for distribution purposes. This statutory directive, without parallel in Section 111[4], mandates distribution to individual copyright owners and to performing rights societies in a particular order and in a particular manner. *Id.* This was the linchpin of the Second Circuit's analysis of the partial settlement before it. *Acemla*, *supra*, 763 F.2d, 108-09.

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[4] To be sure, the music performing rights societies are claimants to the cable royalty distribution proceedings. Pet. App. 48a. No distinction is made, however, between them and other cable royalty claimants for purposes of distributing cable royalties.

In directing how funds are to be divided performing rights societies, Section 116(c)(4)(B) requires either complete agreement among claimants or proof of each individual claim:

> (4) The fees to be distributed shall be divided as follows: ... (b) to the performing rights societies, the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove entitlement.

To the contrary, Section 111(d)(5)(A) specifically permits partial settlements:

> ... (A) ... Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

The statutory differences preclude a finding that the two cases address the same matter.

B. No Important Federal Question Is Presented

The petition does not raise a special and important issue of federal law. (Petition 10–12.) Petitioner's contention that the court below "cavalierly dismissed the explicit requirements for a fair hearing in Section 111 of the Copyright Act because of a policy preference for settlements" (Petition at 11)[5] is demonstrably false.

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[5]Of course, the statute, 17 U.S.C. § 111(d)(5)(A), expresses a policy preference for settlements.

Neither the Tribunal nor the court dispensed with the hearing requirements. The settling parties participated fully in the Tribunal hearing. The settlements had obviated a controversy among these parties, leaving "the only controversy to be determined ... [to be] what award to make, if any, to make to [petitioner]." Pet. App. 90a. The Tribunal "incorporated into the record 20,194 pages of prior distribution proceedings." *Id.* The Tribunal had previously included a "changed circumstances" analytical factor to consider whether circumstances changed enough from year to year to warrant different awards. Pet. App. 21a–22a and 106a–107a. The weight of the prior evidence and the lack of a showing "that the collective situation of the [settling parties] changed in 1982" (Pet. App. 90a) justified granting an award to the settling parties.

As the court below found, this procedure comports with common sense and encourages settlement. Petitioner's alternative requiring proof by all parties absent a total settlement would guarantee a full-blown hearing each year. Pet. App. 36a. Limiting hearing issues to those in controversy provided petitioner with a full hearing, and gave the advantages of settlement to those who settled. Relying on past record evidence in an ongoing process where circumstances had not changed is also appropriate.

Petitioner was given full rights to present evidence, to cross examine, and to submit findings and conclusions. Rather than any lack of due process, the procedures demonstrate both flexibility and responsiveness to the settlement and to developing a full record on the disputed issues. This Court need not and should not exercise its plenary review powers to reexamine the Tribunal's procedure in these circumstances.

II. No Religious Discrimination Can Be Found In The Tribunal's Decision

Petitioner's argument (Petition 14–17) seeking review to

purge claimed religious bias rests upon a Tribunal decision that was vacated upon petitioner's motion. Pet. App. 39a–40a. Petitioner, not satisfied that the challenged decision was rendered null and void, would have this Court investigate the Tribunal's decision-making for possible, albeit unstated and otherwise not apparent, bias. Such investigations are well beyond the review process, absent compelling reasons to look behind an agency's written decision. Furthermore, none of the Tribunal's decisions shows any evidence of unconstitutional motivation (Petition 17).

The vacated decision discusses substantive distinctions related to the established distribution criteria, not religious bias. Petitioner sought a comparison between it and PBS because PBS received a higher award (Pet. App. 51a):

> It has been urged that our award to PBS compels us to make [the] same award to the devotional claimants. The devotional claimants argue that both are noncommercial and that both seek financial support from the public. We find no real similarity. The devotional claimants conduct a Christian ministry.

1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9568 (1983) (Petitioner quotes the continuation of this discussion at 14–15 of the Petition.).

The Tribunal found, however, "no real similarity" because petitioner's programs appeal to a limited audience, while PBS's entire programming "presents a wide range" appealing to different audiences. This difference is factored under the benefit and marketplace value criteria. Comparison of financial support likewise did not show a similarity. Petitioner's support comes from its limited audience and, as developed in the record, may be related to other aspects of its "ministry." In contrast, PBS obtains contributions from a broadly based coalition whose

support goes to programming, PBS's only mandate. This issue relates to whether the marketplace value of programs can be inferred from the amount of contributions. Contributions intended to support other aspects of petitioner's "ministry" do not show program value and are thus of no use in distribution.

The Tribunal addressed the very points of comparison urged by petitioner within the distribution criteria. Even assuming this decision had not been vacated, there are no grounds for petitioner's contention.

Because the decision was vacated shortly after issuance, this situation is not similar to cases relied upon by petitioner (Petition 17) where courts were seeking to reverse decades-old discriminatory practices. Nothing suggests the type of ingrained and systematic hostility and discrimination found in the school desegregation cases was possible, let alone practiced, in the area of royalty distribution between the 1978 proceeding (the initial distribution) and the challenged 1980 proceeding. The absence of bias was confirmed by the court of appeals' findings that the decision "contains no language indicating any hostility toward the Devotional Claimants;" that petitioner was awarded its "fair share" of the 1980 royalties; and that there were no "anti-sectarian sentiments harbored by the Tribunal." Pet. App. 37a.

Petitioner's award in the original appeal of the 1979 distribution decision (Pet. App. 41a *et seq.*) was reviewed "with particular care." Pet. App. 56a. The court again "scrutinized carefully" (Pet. App. 56a and 19a) the second appeal concerning petitioner's award in the 1979 and 1980

decisions,[6] addressing both the record support for the numerical award in 1979 and 1980 distributions, Pet. App. 10a–18a, and the several arguments raised by Petitioner regarding its 1982 award, *id.* 34a–37a.

After its comprehensive review, the court found no evidence of "an unconstitutional hostility" toward petitioner, substantial evidence to support the awards made, and concluded that the three-fold increase in the 1982 award was "scarcely suggestive of hostility" toward petitioner. Pet. App. 37a. In sum, it is impossible to imagine this Court requiring a reviewing court to undertake a more detailed analysis of an agency action, or this Court finding (after yet more investigation) any bias toward petitioner.

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[6]Contrary to Petitioner's claim (Petition at 16), the court below expressly found Petitioner's award "fell comfortably within" the zone of reasonableness. Pet. App. 18a. While the court reminded the Tribunal that "short-hand and toss-away, conclusory sentences" are generally inadequate (*id.* n. 10), this did not detract from the ruling that the award was in the zone of reasonableness.

CONCLUSION

For the reasons stated, the Petition for Writ should be denied.

Respectfully submitted,

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